BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KAREN L. CLARK, Claimant, v. STEVE GARRINGER, STATE FARM INSURANCE, Employer, and AMERICAN CASUALTY COMPANY, Surety, Defendants.	)	**IC 03-009424** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed February 28, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise, Idaho, on October 21, 2004. Claimant was present and represented herself. Glenna M. Christensen of Boise represented Defendants. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties then submitted post-hearing briefs and this matter came under advisement on February 11, 2005.

ISSUES

The issues to be decided are:

1. Whether Claimant suffered an injury from an accident arising out of and in the course of her employment with Employer; and, if so,

2. Whether Claimant timely reported the same to Employer; and, if so,

3. Claimant's entitlement to medical benefits.

CONTENTIONS OF THE PARTIES

Claimant contends she was injured when she helped a delivery person unload some office equipment at Employer's satellite office and Employer should pay her medical, physical therapy, and prescription bills incurred in treating her scapular strain and inflammation.

Defendants contend that due to the different dates given by Claimant for her accident, the accident never happened. Further, even if Claimant had an accident, she failed to report it within 60 days of its happening much to Employer/Surety's prejudice.

Claimant responds that the reason she gave different dates for the accident is because she was unsure of the actual date until she saw the invoice from the delivery company. Further, she gave "casual" notice of her accident in various conversations with Employer and supplied actual notice when she finally went to a doctor.

EVIDENCE CONSIDERED

1. The testimony of Claimant presented at the hearing;

2. Claimant's Exhibits 1-5 admitted at the hearing;

3. Defendants' Exhibits A-G admitted at the hearing; and,

4. The post-hearing deposition of Steve Garringer, Employer herein, taken by Defendants on October 28, 2004. Because Mr. Garringer was not able to attend the hearing, Claimant agreed to allow his deposition to be taken post-hearing. This Referee informed Claimant at hearing that she would be entitled to attend Mr. Garringer's deposition and ask whatever questions of him that she saw fit. In her post-hearing brief, Claimant indicates she was "excluded" from Mr. Garringer's deposition without further explanation. Defendants arranged for the deposition to be taken at the Hilton Garden Inn in Eagle for Claimant's convenience.

Prior to the beginning of the deposition, Employer/Surety's attorney stated that Claimant had called her office earlier on the day of the deposition and indicated she would not be attending but that she did not mind if the deposition proceeded without her. The Referee finds that Claimant voluntarily chose not to attend Mr. Garringer's deposition and was not "excluded."

FINDINGS OF FACT

1. Claimant began working in Employer's insurance and financial services agency as an insurance servicing and marketing representative on December 1, 2001.

2. In April 2003, Claimant volunteered to staff a satellite office in Fruitland that had become vacant when an agent left until a new agent could be located. The office was empty and needed office furniture and equipment.

3. Claimant testified that on April 22, 2003, she strained her back while helping a delivery driver lift a file cabinet and chair from the trailer of a semi truck and into the Fruitland office.

4. Due to disagreements with Employer, Claimant resigned on or about July 16, 2003.

5. After her back did not get better as Claimant had hoped, on August 15, 2003, she presented to Sid Garber, M.D., an orthopedic surgeon. Dr. Garber's note for that date reflects: "This 43 year old lady was involved in loading and unloading furniture in April and felt an immediate pop in her right parascapular area." Defendants' Exhibit D. Dr. Garber diagnosed inflammation of the right parascapular area, gave her an injection of Kenalog and Xylocaine, and prescribed physical therapy.

6. On August 18, 2003, Claimant presented to Idaho Physical Therapy, where it was noted: "The patient reports on April 7, 2003, she hurt her right upper quadrant when she was

helping a truckdriver [*sic*] lift a file cabinet up into his truck." Defendants' Exhibit E. Claimant participated in physical therapy with excellent progress and was released on September 4, 2003.

7. Claimant returned for her second and final visit to Dr. Garber on September 18, 2003, at which time she was discharged from his care.

DISCUSSION AND FURTHER FINDINGS

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). An injury is defined as a personal injury caused by an accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

8. The Referee is having difficulty concluding that Claimant suffered an injury as the result of an accident as she has described for a number of reasons. Her initial difficulty in remembering the date upon which the accident allegedly occurred is not particularly troublesome

as she apparently did not have the benefit of seeing the delivery invoice until after she filed her Form 1 on August 11, 2003, and her Complaint on November 18, 2003, both of which list the accident date as April 7, 2003. What is more troublesome is that a delivery company, CWX, Con-Way Western Express, would send a driver in a truck with no ramp or lift and expect that driver to enlist the aid of its customer to help him or her unload the product. The invoice for delivery indicates the weight of the "PLT OFFICE FURNITURE" to be 175 pounds. One would think that the potential liability of CWX for that practice, if it indeed existed, would far outweigh whatever effort they would have had to expend in arranging for the proper equipment or personnel to safely unload. Further, if the driver needed help unloading the office furniture, one is left to wonder how he loaded the furniture in the first place. Also, the invoice indicates, "INSIDE DELIVERY REQUIRED" and instructs the driver (or someone) to contact "Diane" (an employee of Employer) 24 hours prior to delivery. According to Claimant's hearing testimony, the driver just showed up and told her he needed someone to help him unload. When Claimant could not find anyone to help him, she decided to do it herself. She testified that when they were lowering "it" to the ground, she felt an immediate strain to her back. Nonetheless, she then helped the driver carry the 175-pound "it" into the office.

9. Another problem is the various ways Claimant has described the "it" she allegedly helped to carry: File cabinet and chair (Hearing Transcript, p. 9), bookcase (*Id*., p. 17), all that stuff (*Id*., p. 18), 175 pound cartons (Brief of Karen L. Clark, p. 1), box (*Id*.), and furniture (Form 1 and Complaint).

10. While the foregoing, taken alone, may not be of much significance regarding the occurrence of the alleged accident, when taken together and combined with the following, it is unlikely that an accident as variously described by Claimant occurred. Claimant's Exhibit 5 is

an unsigned typewritten letter dated November 6, 2003, purportedly written by one of Claimant's co-workers, Katherine F. Rose, that states:

> Karen Clark came to work one day in the beginning of April, prior to my leaving on vacation on the 9th, and stated she had been unable to sleep the night prior due to her back hurting from lifting boxes and a filing cabinet from a truck and moving things around in the new Fruitland office the day before. After that, she made many statements and complaints regarding her back hurting in front of the entire office.

Claimant's Exhibit 5. (Emphasis added).

11. Rose's letter contradicts Claimant's testimony regarding the correct date of the accident; April 22, 2003. According to Rose, Claimant described her alleged accident and injury as occurring before April 9th. Further, Claimant has consistently testified, and Rose and other co-workers corroborate, that Claimant complained of a back strain, yet the treatment for which she now seeks compensation was for parascapular inflammation, which is a shoulder, not a back problem.

12. When carefully considering the cumulative effects of the contradictions and inconsistencies present in this matter, the Referee concludes and finds that Claimant has failed to prove she suffered an injury caused by an accident on April 22, 2003.

13. In light of the above finding, the remaining issues are moot.

CONCLUSIONS OF LAW

1. Claimant has failed to prove she suffered an injury caused by an accident on April 22, 2003.

2. The remaining issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __23rd ___ day of ___February___, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __28th __ day of __February___, 2005, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

KAREN L CLARK
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__/s/_____

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